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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. <u>93-26</u>
)	
STEVEN L. GRADICK)	File No. BPH-911031MD
)	
TERRY C. JENKS)	File No. BPH-911031MF
)	
For Construction Permit for a)	
New FM Station on Channel 288A at)	
Bowdon, Georgia)	

To: Administrative Law Judge
 Richard L. Sippel

MASS MEDIA BUREAU'S OPPOSITION TO
MOTION TO MODIFY ISSUES

1. On March 26, 1993, Steven L. Gradick ("Gradick") filed a motion to modify issues. On April 2, 1993, Gradick filed a supplement to his motion. The Mass Media Bureau submits the following comments in opposition.

2. Gradick requests that the application of Terry C. Jenks ("Jenks") be subject to a condition pending the outcome of MM Docket No. 90-309.¹ In that docket, a pending petition for reconsideration alleges, inter alia, that Jenks and others working in concert with him abused the Commission's processes. Citing Wometco Enterprises, Inc., 55 RR 2d 1545, 1552 (MMB 1984), Gradick submits that the appropriate procedure is to condition any grant to the alleged wrongdoer on the outcome of the

¹ In MM Docket 90-309, the Commission, by the Chief, Allocations Branch, granted Jenks' proposal to allot Channel 288A to Bowdon and denied conflicting proposals. See Report and Order, 6 FCC Rcd 4863 (MMB 1991).

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proceeding in which the misconduct is alleged.

3. The Bureau submits Gradick's motion is based on a faulty premise; namely, that some question exists with respect to the bona fides of Jenks' proposal to have Channel 288A allotted to Bowdon. The supplement to Gradick's motion correctly observes that the Bureau did conduct an inquiry in response to a request for an investigation by Design Media, Inc. ("Design"), one of the parties in MM Docket 90-309. By a letter dated January 29, 1992, the Bureau found that Design's claims regarding Jenks were "not substantiated." See Attachment A, p. 4. Moreover, after conducting further inquiries, the Bureau closed the investigation by letter dated February 10, 1993. See Attachment B. Significantly, Design did not seek reconsideration of either Bureau action.

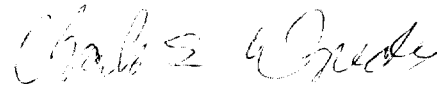
4. In any event, Gradick's reliance on Wometco is misplaced. In Wometco, the Commission declined to hold a hearing based on allegations taken from a pending lawsuit involving the applicants. Rather, the Commission granted the applications but conditioned the grants on the outcome of the pending federal civil litigation.² With respect to Jenks, however, there is no

² The Commission has retained its discretion to condition the grant of any application on the outcome of proceedings involving non-FCC misconduct. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1206 n.66 (1986) (subsequent history omitted). See also, Amendment of Part 1 - Broadcast Licensing, 5 FCC Rcd 3252, 3253 (1990).

pending proceeding whereby the alleged wrongdoing of Jenks will be adjudicated. Simply put, the allocation proceeding is not designed to determine whether Jenks or anyone connected with him abused the Commission's processes. Moreover, as discussed above, the Bureau has already found that no abuse of process took place.

5. Accordingly, the Bureau submits that the motion to modify issues filed by Gradick should be denied.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Charles E. Dziedzic
Chief, Hearing Branch



James W. Shook
Attorney
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April 8, 1993

CERTIFICATE OF SERVICE

Michelle C. Mebane, secretary of the Hearing Branch, Mass Media Bureau, certifies that she has on this 8th day of April, 1993, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Opposition to Motion to Modify Issues**" to:

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Michelle C. Mebane

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

January 29, 1992

IN REPLY REFER TO:

GPS/7212

Certified Mail - Return Receipt Requested

John S. Neely, Esq.
Miller & Miller, P.C.
1990 M Street, N.W., Suite 760
Washington, D.C. 20036

Dear Mr. Neely:

The Commission is in receipt of a Request for Commission Inquiry, filed September 26, 1991, by Design Media, Inc. ("Design"), and three opposition pleadings, filed by Terry C. Jenks ("Jenks"), Gleamer Lee Smith ("Smith"), and Dallas M. Tarkenton ("Tarkenton"). Design requests that the Commission commence a formal investigatory proceeding, pursuant to § 403 of the Communications Act of 1934, as amended, to determine whether Jenks, Smith and Tarkenton engaged in an abuse of the Commission's processes, and whether Tarkenton committed a violation of § 73.3513 of the Commission's Rules.

Background

Design is the licensee of Station WQUL(FM) (Channel 249A), Griffin, Georgia. In Rulemaking Proceeding MM Docket No. 90-309, Design requested that the Commission substitute Channel 248C3 for 249A at Griffin, and modify WQUL(FM)'s license to specify operation on the higher powered channel. In order to accomplish the upgrade at Griffin, Design also proposed to substitute Channel 288A for 248A at Hogansville, Georgia. However, Jenks and another entity, Bowdon Broadcasters, Inc. ("BBI"), independently filed counterproposals requesting the allotment of Channel 288A to Bowdon, Georgia, as that community's first local service.

Although BBI eventually dismissed its counterproposal in consideration for the payment of money by Design, Jenks continued to prosecute his counterproposal for the allotment of a new FM channel at Bowdon. In Report and Order, 6 FCC Rcd 4863 (1991), the Chief, Allocations Branch, determined that Jenks' counterproposal would better serve the public interest. As a consequence, Design's plan to upgrade WQUL(FM)'s facilities was frustrated. Subsequently, on September 19, 1991, Design filed a

Petition for Reconsideration remains pending before the Chief, Allocations Branch.

Design's Allegations

Design asserts in its Request for Inquiry that the information contained in its Petition for Reconsideration raises a prima facie case of fraud upon the Commission. In support, Design provides a Declaration of Michael Bergner ("Bergner"), an attorney and radio station broker who represented BBI in the allocation proceeding. Bergner states that the amount of money that Design was willing to pay BBI to dismiss its counterproposal would have been significantly greater had Jenks also agreed to settle. Following several unsuccessful attempts to contact Jenks by mail and telephone, Bergner, on September 22, 1990, traveled to Jenks' home to personally appeal to Jenks to dismiss his counterproposal. Although Jenks flatly refused to even consider settling, Bergner states that he learned that Jenks had filed his counterproposal at the suggestion of a long-time friend, Gleamer Lee Smith ("Smith").

Design states that the connection between Jenks and Smith provides a "crucial link" in a chain of facts, which, when taken together, establish a prima facie case that Jenks did not file his counterproposal for the legitimate purpose of ultimately applying for a construction permit for a new FM station. Rather, according to Design, Jenks filed his counterproposal to aid and abet Smith and Smith's business partner, Dallas M. Tarkenton ("Tarkenton"), in their efforts to prevent Design from upgrading WQUL(FM)'s facilities and/or to force Design to sell WQUL(FM) to Tarkenton at less than market value.

According to Design, before Jenks filed his counterproposal, Tarkenton threatened to file a counterproposal unless Design paid Tarkenton money. Design further argues that after Jenks filed his counterproposal, Tarkenton offered to buy WQUL(FM) and another Design-owned station for a price that was far less than the stations would be worth if WQUL(FM) were allowed to upgrade.

Design also claims that Tarkenton has a history of abusing the Commission's processes. According to a handwriting expert retained by Design, Tarkenton "in all probability" signed the applications and amendments for his son Stephen's application for a new FM station at Lafayette, Florida (BPH-870720MU). Design also claims that Tarkenton was the undisclosed real party in his son Christopher's application for a new FM in Hogansville, Georgia. See Memorandum Opinion and Order, FCC 90M-1469 (released June 4, 1990). Design further maintains that despite the fact that Tarkenton sold Stations WMKJ(FM) and WCOH(AM), Newnan, Georgia, to his son, Dallas III, in 1985, the stations continue to operate from the father's office in Athens, Georgia.

The Responses

Jenks

Jenks states that he has known Smith for most of his adult life and has consulted Smith on several occasions about possible opportunities in the broadcasting business. Contrary to Design's allegations, Jenks maintains that he sought Smith's advice about the possibility of pursuing the allotment of a new FM channel in Bowdon and that Smith never asked, suggested, recommended, or otherwise urged him to file his counterproposal for any illegitimate purpose or to benefit anyone other than himself. Jenks also states that he does not know, has never met, and has never even spoken with Tarkenton or any of his sons.

Jenks declares that he filed his counterproposal solely out of a desire to apply for a new FM station at Bowdon. On October 31, 1991, Jenks in fact was among four applicants who filed FCC Forms 301 for a construction permit for a new FM station to serve Bowdon, Georgia.

Smith

Smith essentially corroborates Jenks' statements. Smith maintains that Jenks discussed his interest in owning a radio station before Design ever filed its petition for an upgrade of WQUL(FM)'s facilities. Smith declares that he had no knowledge of Design's plan to upgrade WQUL(FM) until after Jenks decided to pursue the concept of seeking an allotment at Bowdon. Moreover, Smith flatly denies that Tarkenton ever communicated any suggestion to him that a counterproposal should be filed for any purpose.

Tarkenton

Tarkenton states that he has never spoken to Jenks and has never directed anyone else to do so on his behalf. Tarkenton also asserts that he has no knowledge of any matter concerning Jenks' counterproposal. Tarkenton further contends that the only joint media relationship that he ever had with Smith existed from 1985 to 1990, during which time Tarkenton held a majority interest and Smith owned 5% or less in the licensee of Station WBTR(FM), Carrollton, Georgia. However, Tarkenton points out that at the time Jenks filed his counterproposal, Tarkenton and Smith had already contracted to sell WBTR(FM).

Although he concedes to having telephoned Design's president in January 1990, Tarkenton rejects the accusation that he ever made any threat to extort money from Design. Tarkenton explains that the purpose of his telephone call was to inquire whether Design would be interested in some type of time brokerage arrangement in the event Tarkenton's son, Christopher, was

successful in obtaining a construction permit for a new FM station in Hogansville, Georgia. Tarkenton also categorically denies making any offer to buy WQUL(FM) or authorizing anyone to make an offer on his behalf.

Tarkenton does not deny Design's allegation that he signed his son Stephen's application for a construction permit for a new FM station at Lafayette, Florida. Rather, Tarkenton asserts that even if there were an impropriety with regard to the Lafayette application, the most that can be said is that the application was improperly filed. Since the application has long since been voluntarily dismissed, Tarkenton claims that it would be a waste of Commission resources to investigate the matter. Moreover, according to Tarkenton, such an investigation would have no bearing on the outcome of the allocation proceeding

Tarkenton also states that there is no basis to conclude that he was an undisclosed real party-in-interest in his son Christopher's application for a construction permit for a new FM station at Hogansville, Georgia. To the contrary, Tarkenton argues that the MO&O on which Design relies for this allegation involved a ruling by the Presiding Judge on whether the elder Tarkenton should be deposed. The MO&O does not, according to Tarkenton, find or conclude that he was an undisclosed real party to the application.

Finally, Tarkenton does not deny Design's allegation that he has failed to fulfill his pledge that there be an arms length

Based on the facts presented, we are unable at this time to find the existence of any "crucial link" between Jenks and Tarkenton. Jenks declares that he filed his counterproposal solely out of a long-standing interest in applying for and operating his own radio station. Jenks' subsequent submission of an application for the Bowdon allotment could be construed to represent an affirmative demonstration of the veracity of his expression of interest. Jenks further states that he does not know, has never met, and has never spoken with Tarkenton and that he, Jenks, approached Smith about the possibility of proposing the Bowdon allotment, not vice versa. For his part, Smith declares that he never urged Jenks to file or prosecute his counterproposal on behalf of anyone or for any illegitimate objective. Moreover, Smith's interest in WBTR(FM) with Tarkenton appears to have no relevance to the rulemaking proceeding given the fact that the radio station was under contract to be sold at the time Jenks filed his counterproposal.

In sum, we are unable to conclude, based on the information before us, that Jenks' counterproposal was filed for an improper purpose. Simply stated, the existence of Smith as the "crucial link" between Jenks and Tarkenton is unsubstantiated. Consequently, the initiation of a formal Commission inquiry into whether there has been a fraud committed upon the Commission within the context of the rulemaking proceeding would be premature. Accordingly, we will defer action on Design's request for a § 403 investigation.

Notwithstanding the foregoing, we believe that further inquiry is warranted at this time because Tarkenton's opposition pleading failed to adequately respond to certain of Design's allegations. Specifically, we are concerned about the nature and extent, if any, of Dallas M. Tarkenton's involvement in the various applications for FCC authorizations filed by his sons. We are also concerned about the nature and extent, if any, of Dallas M. Tarkenton's involvement in the operations of broadcast stations in which his sons have interests. In order that we may be more fully informed, Dallas M. Tarkenton is requested to respond to the following:

1. Identify the nature and extent of all interests held by Dallas M. Tarkenton at the present time in any broadcast station.
2. Identify the nature and extent of all interests held by Stephen Tarkenton at the present time in any broadcast station.
3. Identify the nature and extent of all interests held by Christopher Tarkenton at the present time in any broadcast station.

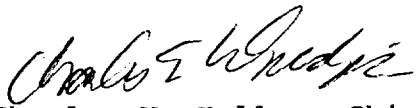
4. Identify the nature and extent of all interests held by Dallas Tarkenton III at the present time in any broadcast station.

5. Identify the nature and extent, if any, of Dallas M. Tarkenton's involvement in the preparation, prosecution, and disposition of Stephen Tarkenton's application for a construction permit for a new FM station at Lafayette, Florida (File No. BPH-870720MU).

6. State whether Dallas M. Tarkenton signed the application of Stephen Tarkenton for a construction

Dallas M. Tarkenton is requested to direct his response to:
Gary P. Schonman, Esq., Federal Communications Commission, Mass
Media Bureau, 2025 M Street, N.W., Suite 7212, Washington, D.C.
20554.

Sincerely,

for 
Charles W. Kelley, Chief
Enforcement Division
Mass Media Bureau

cc: (By First Class U.S. Mail)

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FEDERAL COMMUNICATIONS COMMISSION

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ATTACHMENT

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February 10, 1993

Certified Mail - Return Receipt Requested


John S. Neely, Esq.
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1990 M Street, N.W., Suite 760
Washington, D.C. 20036

Dear Mr. Neely:

The Commission is in receipt of your responses to official letters of inquiry, submitted February 18, 1992, and December 17, 1992, on behalf of Dallas M. Tarkenton. The letters of inquiry were precipitated by concerns that Mr. Tarkenton abused the Commission's processes, was or is an undisclosed real party-in-interest in applications for broadcast facilities filed by or on behalf of one or more of his sons, or otherwise engaged in Commission-related misconduct.

Based on the information currently before the Commission, we find there is no warrant at this time for further action. Accordingly, this matter is hereby closed.

Sincerely,

for 

Charles W. Kelley
Chief, Enforcement Division
Mass Media Bureau

cc: David Tillotson, Esq.
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Suite 1739
Washington, D.C. 20007